No. 21,840

United States Court of Appeals

For the Ninth Circuit

EDWIN CORDERO and FLORENCE LEWIS, individually and doing business as Cordero and Lewis Appliances,

Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY, a corporation,

Appellee.

Appeal from the Judgment of the United States District Court, Eastern District of California at Fresno, California

Honorable M. D. Crocker, Judge

APPELLEE'S REPLY BRIEF

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APPELLEE'S REPLY BRIEF

I. JURISDICTION OF THE UNITED STATES COURT OF APPEALS.

Appellee is in accord with the statement of jurisdiction as contained in the opening brief.

II. STATEMENT OF THE CASE.

Appellee is in accord with the statement of the case as is contained in the opening brief, except that a more accurate statement of the situation would be that an endorsement was added to the pre-existing policy. This new endorsement covered property at 1105 Sixth Street, Los Banos, with a limit of liability thereon of $25,000.00. Plaintiffs seek in this action to reform this endorsement to raise the limit of liability at 1105 Sixth Street from $25,000.00 to $50,000.00.

III. STATEMENT OF FACTS.

Appellee disagrees with the statement of the facts set forth in the opening brief. In view of the fact that the statement therein is argumentative in some particulars, and incomplete in others, appellee undertakes herein to restate the facts, noting where there are any material conflicts of evidence.

Plaintiffs Edwin Cordeiro and Edmund Lewis were the operators of a mercantile establishment known as "The Firestone Store" at 1032 Sixth Street, Los Banos, California. This was a franchise operation by the Firestone Company. (RT 42:12-18.)

The stock of goods consisted of home appliances, such as refrigerators, freezers, washing machines, dryers,

> "and so on; also a TV line, which includes TVs and Stereos and at that time no color and then we had a complete line of toys, housewares—now, housewares includes complete housewares, pots and pans and small appliances; we had a record department and giftware."
>
> (RT 41:18-22.)

Harry Miller was insurer's soliciting agent in Los Banos. (Hereafter, appellee will be referred to as Insurer for purposes of convenience and clarity.) Mr. Miller was empowered to solicit and receive proposals for insurance of the classes designated in his agency agreement. (Plaintiffs' Exhibits 1 and 3.) The Insurer also stood ready to render to Mr. Miller such special assistance as he might need. (Plaintiffs' Exhibit 2.)

In April, 1963, insurer issued to appellants the original policy of insurance. (Plaintiffs' Exhibit 6.) Exhibit 6 as now in the record includes the subsequent endorsement which plaintiffs seek to reform. This came about as the result of Mr. Miller asking insurer to send its special agent or field man to the scene, and working out the details of the insurance. (RT 176: 17-20.) This special agent was Mr. Marvin Hoffman, also known as Mr. Dave Hoffman. As a result of Mr. Hoffman's negotiations with Mr. Cordeiro a reporting form policy was issued covering the various liabilities and exposures involved with the operation of the Firestone Store. (Plaintiffs' Exhibit 6, RT 138:21-23.)

This contract is a "reporting form" of contract. It provides in part:

"13. Full Reporting. In the event of loss or damage to the property insured hereunder, the liability of this Company shall in no event exceed a greater proportion of such loss or damage than the total value last reported by the insured prior to such loss or damage bears to the actual values at risk hereunder as of the date for which such report was made. *Any loss in excess of the limits of liability stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported.*" (Emphasis added.)

The limit of liability stated in the policy covering the Firestone Store (referred to in the transcript from time to time as "the old location") on stock and equipment was $50,000.00. This limit was established as a result of the discussion with Mr. Cordeiro, who, presumptively, had the best knowledge of the amount of goods he would have exposed to loss by fire and the other perils insured against. Amounts of insurance and exposures as to other interests of the insureds were likewise determined.

"Q. It states the words, 'Limit, 50,000'; what does that mean, sir?

A. That means the limit of the stock and equipment.

Q. Do you mean the total value of stock and equipment?

A. The limit of liability.

Q. And how did you determine that or who told you that, sir?

A. The insured.

Q. It states 9,000 equip. and tenant's improvements; what does that mean, sir?

A. That means his equipment and tenant's improvements.

Q. What does the 9,000 mean?

A. The 9,000 is the average value.

Q. $9,000?

A. $9,000.

Q. It states 30,000 average stock; what does that mean, sir?

A. That means his average inventory was $30,000 for the past 12 months.

Q. And how did you find that out?

A. From the insured.

Q. It states 1500 in transit open (½ ton pick-up); what does that mean, sir?

A. That provides a limit of $1500, amount of insurance, for any one catastrophe during transit on this particular vehicle or any other vehicle he may acquire.

Q. How did you find that out, sir?

A. From the insured."

(RT 178:19-179:22.)

* * * *

"Q. What was the discussion?

A. The limit of liability that was established.

Q. And did you tell them what limit of liability had been established?

A. No; we don't do that. It's up to the insured to establish the limit of liability."

(RT 140:16-21.)

There is no testimony of plaintiffs that they did not know of this fifty thousand dollar limit of liability for stock and equipment at the Firestone Store. The best they could say was that Mr. Hoffman "never stated any limitations at all to me". (RT 44:19-20.)

In April, 1964, Mr. Hoffman was again on the scene on behalf of Insurer. Plaintiffs had arranged to purchase a furniture store from a Mr. Enos who was retiring from that business. This store was across the street from the old location, and about a half a block away. (RT 83:16.)

As a result of the second visit of Mr. Hoffman, an endorsement was added to the insurance policy, providing coverage for stock and equipment at the new location, with a limit of liability of $25,000.00. (Plaintiffs' Exhibit 6.)

It is plaintiffs' purpose in this action to reform that endorsement to raise the limit of liability to $50,000.00. It is therefore appropriate to devote the remainder of this portion of the brief to the evidence presented, as to the circumstances out of which this endorsement with the $25,000.00 limit was agreed to by the plaintiffs and the insurer.

At the time of the negotiations for the insurance on the new location, it was the stated intention of Mr. Cordeiro to operate stores at both locations. When the subject of insurance on the new location was first raised by Mr. Cordeiro to Mr. Miller, Mr. Cordeiro stated:

> "A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and *that I was to move my office and everything to the furniture*

store and then we would keep the other store as-is, with giftware, records and housewares business with the two women. That is the extent of the conversation at that time.

Q. What did he say?

A. He said he would get Mr. Dave Hoffman down here to package the deal for us.

Q. Did Mr. Dave Hoffman come down?

A. Yes, sir."

(RT 53:3-20; emphasis by counsel.)

It is noteworthy that the very first communication by plaintiffs about the insurance on the new location reflected (1) that plaintiff Cordeiro was aware of the insurance problems (RT 53:6) and also (2) it was his announced intention to retain the *status quo* on the old location. (RT 53:12.)

The negotiations between plaintiffs as insured, and appellee, as insurer, which resulted in the issue of the endorsement with the $25,000.00 limit which is now in dispute, were handled entirely by Mr. Cordeiro and Mr. Hoffman. Mr. Miller did not participate on behalf of the insurer. Mr. Miller testified:

"Q. So far as the negotiations for the insurance were concerned, you left that in the hands of Mr. Hoffman, did you not? With respect to the new location, of course.

A. Both locations.

Q. Well, I'm asking you with respect to the new location. You left that to Mr. Hoffman?

A. I left what?

Q. The negotiations between Mr. Lewis and Mr. Cordeiro on the one hand and Mr. Hoffman and the company on the other, you left that aspect of the matter to be handled by or dominated by Mr. Hoffman, didn't you?

[Objections and Rulings.]

The Witness: Now, are we talking about writing down all the information, listing it, taking the area of the building for the liability coverage?

Q. The matter——

A. The matter of the inventory?

Q. The matter of the inventory, the asking of the questions on the one hand and the answering them on the other so that an agreement, a meeting of the minds could be had between insured and insurer?

[Objections and ruling permitting answer.]

The Witness: Well, naturally there was discussion and I left most of it up to Mr. Hoffman, because he is a direct representative of the company and there's information that he needed."

(RT 34:6-35:15.)

So far as Mr. Miller's observations as to the physical inventory situation at the new location, he merely observed some "white goods", refrigerators and washers, in the new location.

"Q. How about the white goods?

A. Oh, there were several of them. As far as counting them individually, I didn't take any inventory to that effect."

(RT 37:13-15.)

And what could be more normal in the inventory of a furniture store than the display of several gleaming home appliances?

However, this observation does not impute any knowledge to Mr. Miller concerning the expected total of the furniture inventory, since he had already been

expressly informed by Mr. Cordeiro that the insured intended to retain the old location where the appliances had been sold, and continue to do business there.

"Q. You were aware at that time, at the time you made these observations, were you not, that it was the intention of Mr. Cordeiro and Mr. Lewis to maintain or retain the old location and sell from there, too?

A. They were in the process of possibly weeding that store out eventually; they wouldn't have need of it.

Q. Now, Mr. Miller, is it your testimony that at that time Mr. Cordeiro and Mr. Lewis were uncertain as to whether or not they were going to keep the old location?

A. I wouldn't say they were uncertain, no, but this was thought of eventually, maybe when their lease ran out, maybe that they would eventually just abandon that location.

Q. Well, their immediate plans were to maintain or retain the old location, were they not?

A. That is correct; yes.

Q. Now, did Mr. Enos, when he had the furniture store——. Let me withdraw that.

You were aware that Mr. Cordeiro and Mr. Lewis purchased the remaining inventory of Mr. Enos?

A. That is correct.

Q. Did Mr. Enos have any floor models or demonstration refrigerators or stereos or TVs in his store?

A. Mr. Enos didn't handle appliances. He could have had possibly——

Mr. Cathcart: Just a moment. We will object to what Mr. Enos could have had.

The Witness: *I don't know what he had,* because I didn't have the place insured to begin with.

By Mr. Downs:

Q. Well, do you know that Mr. Enos had televisions?

A. He had furniture.

Q. He had television sets, too, didn't he, sir?

A. I don't know."

(RT 38:6-39:15.) (Emphasis by counsel.)

Since Mr. Miller didn't know what Mr. Enos' inventory was, or of what it consisted since he had not participated in the insurance on behalf of Mr. Enos, Mr. Miller, and the Insurer, could hardly be charged with knowledge of a future inventory by plaintiffs, based on this single observation.

The limit of liability of $25,000.00 on the endorsement which was issued, was established through the representations of Mr. Cordeiro to Mr. Hoffman. It is of vital significance to observe that at no time did Mr. Cordeiro ever state to Mr. Hoffman that he, Mr. Cordeiro, wanted a $50,000.00 limit of liability on the new location. What Mr. Cordeiro did do was tell Mr. Hoffman what the inventory was on the new location, and the limit of liability was set accordingly at $25,000.00, the trial Court finding as a fact that Mr. Cordeiro was so informed. (CT 81.)

Mr. Cordeiro testified (emphasis by counsel):

"Q. All right. Now, will you tell me the conversation you had with Mr. Hoffman or the conversation with Mr. Miller when Mr. Hoffman was present on the subject of insurance?

A. At that time, we stated we wanted the same insurance again; in other words, we were talking about the block form, and they said they would give us the same coverage. In fact, I told them that day we had the inventory complete and

the equipment complete, because Mr. Enos and I had just finished the inventory and we had a complete form that we handed to Mr. Miller and Mr. Hoffman got it that day, in fact. It was the inventory of the new place now, only; we were talking about the furniture only and the equipment I bought from Mr. Enos.

Also, that day I explained to them that we were moving——

Q. Explained to whom?

A. Mr. Hoffman and Mr. Miller.

Q. Yes.

A. ——that we were moving. In fact I showed them the TVs and the stereos, how we displayed them with the furniture and how we tied in the furniture and the appliance together and we were going to run one operation there and *we would be moving* everything over—in fact, that day we were."

(RT 54:13-55:12.)

Two observations should be made as to this testimony. First plaintiff Cordeiro states he did deliver the inventory to Mr. Hoffman. (Verified by Mr. Hoffman, RT 186:6-9.) Secondly, the matter of moving over appliances was a prospective operation—one to be done in the future. Television and stereo sets would, to the normal person be an item of furniture inventory. As to "white goods", only 15 such items were on hand (RT 56:9-15), hardly enough to alert a person that the yet unperformed and unstated intent of Mr. Cordeiro was to change the furniture store into an appliance store.

Upon cross-examination, Mr. Cordeiro stated again that he never advised Mr. Hoffman that he desired a limit of liability of $50,000.00 at the new location. In-

deed, he stated that he never asked Hoffman at all for any specific amount of insurance in dollars. What he did do was supply the inventory figures to Hoffman, which inventory figures were not augmented by any so-called "white goods" plaintiffs had already moved, or may have intended to move, into the store at the new location. Said Mr. Cordeiro:

"Q. Now, what was it that you asked for with respect to the insurance on the new location; what did you tell Mr. Hoffman you wanted?

A. That we wanted the same coverage we had, sir.

Q. And by 'same coverage', you mean you wanted the same kind of reporting form policy?

A. Right, sir.

Q. Now, you never discussed the matter of dollars in amount of insurance with Mr. Hoffman at that time, did you?

A. No, sir.

Q. And you never specified any outside limits of insurance that you wanted?

A. No, sir.

Q. Did Mr. Hoffman ask you what the inventory was?

A. Of the place we were buying?

Q. Of the new location?

A. Yes, sir; we gave it to him.

Q. And did you tell him approximately how much it was?

A. It was approximately $17,000 we were buying.

Q. And how about the equipment?

A. The equipment was probably four—three or four thousand in equipment.

Q. And did Mr. Hoffman then say to you that $25,000 was the limit, that would appear to be adequate?

A. No, sir.

Q. No such declaration was made?

A. No, sir.

Q. You did tell Mr. Hoffman it was your intention to retain the old store?

A. Yes, sir.

Q. Then with respect to the limit or the amount of fire insurance you neither said to Mr. Hoffman what the outside limit was supposed to be and he never said to you what it was going to be?"

(RT 74:6-75:16.)

An answer was given to the last question, was stricken by the trial judge upon motion, and then the following appears in the transcript:

(Question read by the reporter as follows):

"'Q. Then with respect to the limit of the amount of fire insurance you neither said to Mr. Hoffman what the outside limit was supposed to be and he never said to you what it was going to be?'

The Witness: Specific amount of money, sir?

Mr. Downs: Right.

The Witness: No, sir.

* * * * * * *

Q. Did Mr. Hoffman ever say to you that you were going to be covered to the extent of $50,000 for fire insurance on stock and equipment?

A. No, sir."

(RT 76:3-11, 20-23.)

Thus, it appears that not only did Mr. Cordeiro fail to convey to Mr. Hoffman that he wanted a limit of liability of $50,000.00 at the new location, but also, Mr. Cordeiro admits that Mr. Hoffman never told

him that he would have a limit of liability of $50,000.00.

Mr. Hoffman's testimony, when considered with that of Mr. Cordeiro, makes it very clear that so far as the limit of liability of $25,000.00 on the new location was concerned, the only information imparted to Mr. Hoffman by the insured was that the furniture store was to be a new location, and that the inventory therein was about $16,000.00, and the fixtures and tenants' improvements were about $3,000.00.

Mr. Hoffman has no recollection of seeing appliances in the new location. (RT 145:21-23.) Common experience demonstrates that there is no reason why he should have a specific recollection of a particular item of stock which is common to all furniture stores.

As to the future intentions of Mr. Cordeiro concerning appliances, the intelligence imparted to Mr. Hoffman by Mr. Cordeiro was only that Mr. Cordeiro intended to move in a few appliances for "display purposes".

> "Q. Now, do you recall any mention at all having been made of appliances on that day?
>
> A. Some mention was made that a few items would be moved in. I——
>
> Q. Who made that mention?
>
> Mr. Downs: Let him finish his answer.
>
> The Witness: I don't recall.
>
> By Mr. Cathcart:
>
> Q. Finish your answer, please?
>
> A. There was a casual remark, as I understand it, that they would have some in there on display, for sale and so on.
>
> Q. That they would have some appliances in there on display for sale?

A. Just to be shown, as I understood it: that they would be there *for display purposes only,* as I got it."

(RT 146:12-25, 147:1-5.) (Emphasis by counsel.)

And what could be more natural to such an operation? With the appliance store in the same block, a few display models in the furniture store would serve the purpose of a combined furniture and appliance operation which Mr. Cordeiro mentioned in his testimony.

As the function of Mr. Hoffman was to determine the amount of goods likely to be at risk, so that the limit of liability could be agreed upon by insurer and insured, Mr. Hoffman asked Mr. Cordeiro the only logical questions. He testified:

"Q. All right. Did someone tell you how much furniture they were acquiring at that new location?

A. Yes.

Q. Who did?

A. Mr. Cordeiro.

Q. How much did he tell you?

A. On furniture stock, in inventory?

Q. Yes.

A. He said there was $16,000.

Q. Did he say anything in addition to $16,000?

A. Not insofar as the stock is concerned.

Q. Well, did he say anything about the equipment or tenant's improvements?

A. Yes.

Q. And what did he say he was acquiring in the way of equipment and tenant's improvements?

A. That that was part of the deal in purchasing the furniture store, that there was a certain amount of equipment in there.

Q. Well, did he tell you how much, the value?
A. $3,000.
Q. He said $3,000 in equipment and tenant's improvements?"
(RT 150:15-151:12.)

This is entirely consistent with Mr. Cordeiro's previous testimony.

The most credible evidence as to what transpired between Mr. Hoffman and Mr. Cordeiro in April, 1964 is the field notes and memoranda of Mr. Hoffman. These are defendant insurer's Exhibits E, F and H, and are described in the Reporter's Transcript, pages 184 through 194. These were prepared contemporaneously with the events involved. More important, they were prepared at a time before a dispute arose. Defendant's Exhibit E describes the results of the conference with Mr. Cordeiro. It is to be noted that it verifies what Mr. Hoffman was told about the amount of the inventory and the value of the equipment. Defendant's Exhibit H, Mr. Hoffman's summary of the field notes on the new location, describes the new location as "retail furniture store". Had appliances been pointed out, emphasized, stressed, or otherwise brought to the attention of Mr. Hoffman, there would have been notes to this effect. The notes evidence what the transaction was—that the parties agreed upon a $25,000.00 limit on the new location, and Mr. Cordeiro was so informed.

"Q. Now, with respect to your discussion with Mr. Cordeiro at the time that you arranged for the insurance on the second location, did Mr. Cordeiro——. Withdraw that.
Did you tell Mr. Cordeiro that the limits were going to be $25,000?

A. Yes.

Q. And did he disagree with you as to that limit?

A. No.

Q. Did he ever ask for any more insurance than $25,000 on the second location?

A. No, sir."

(RT 158:10-20.)

The presence or absence of a few display appliances does not affect the credibility of Mr. Hoffman, or the Defendant's Exhibits E, F, and H. Nor does it support the gratuitous assertion in the footnote on page 14 of Appellant's Brief that "Defendant's Exhibit E, presumably written at a time when Hoffman had forgotten that the appliances were being moved". It is simply that a few display appliances were not material considerations in the insurance asked for by plaintiff.

"Q. Mr. Hoffman, as an insurance man, would the fact that a few appliances were going to be moved into a furniture store change its character as a risk?

(Objection and ruling.)

The Witness: No, sir."

(RT 158:1-7.)

Appellants' Opening Brief, in Heading IV, Statement of Facts, contains other inaccuracies which must be corrected. On page 6, it is stated that the insured "was required by the new policy (Plaintiffs' Exhibit 6) to report to the insurance company on forms furnished by the company. . . ." This declaration is wholly untrue. There is nothing in Plaintiffs' Exhibit 6, the insurance policy, which requires that the

reports of values be made on company supplied forms. Further, Mr. Girdlestone testified the exact opposite was true:

"Q. Did this policy provide for reporting by the assured?

A. Yes.

Q. Was it the intention of the company that the assured should report on any particular form?

A. No, sir; it's not necessary. Some assureds even make reports on their own letterheads."

(RT 96:12-18.)

Nor is it exactly in accord with the record that Mr. Hoffman "confirmed the insured was not advised as to the limits of the insurer's liability" as is stated at the bottom of page 6 and the top of page 7 of Appellants' brief. The facts are as reported in the transcript on page 141.

"Q. Well, you said a moment ago, as I understood you, that it was up to the assured to establish the limits of liability?

A. They establish the limit of liability and it is presented to us and we would say we would either accept a million dollar limit or we would tell them that we could handle, say, only $100,000 of it.

Q. All right. And on this particular occasion did Mr. Cordeiro tell you any specific amount of insurance that he was going to establish as the limit of liability on this policy?

A. I don't recall that."

(RT 141:1-12.)

And concerning the matter raised on page 12, and that Mr. Hoffman "neglected to inform himself as to how many or tell his employer, the defendant, that

any appliances were being moved," the true story is the remainder of the testimony on the transcript page cited (RT 157:10-20) in which Mr. Hoffman said he did learn a few items of appliances were being moved, and on RT 158, explains that the introduction of *only* a few items is not a material consideration in the matter of insurance. It being the duty of the insured, as is enlarged upon in the next section of this brief, to make the disclosures necessary to enable the contract of insurance to be made, the use of the word "neglect" with reference to the conduct of Mr. Hoffman is to import a sly inference of wrongdoing which neither the record nor the law justifies.

That Mr. Cordeiro never saw the endorsement which extended the coverage to the new location, as is stated on page 12, can hardly be relevant. He admits the original policy was delivered into his custody, and that "Probably it was put in the safe by Jennie" (RT 69:17-24), and that he did not read it. The fact is that he had no intention of ever reading any of the policies, or keeping track of the insurance. He elected to delegate that duty to others, but without informing them of such delegation.

> "Q. Can you tell us why you didn't read it?
> A. Well, sir, to be honest with you, I kind of left it up to Mr. Miller and Mr. Hoffman to take care of that part of it."
> (RT 70:2-5.)

There is nothing in the record to show that Mr. Miller or Mr. Hoffman were ever informed by Mr. Cordeiro that he was charging them with this responsibility.

Appellants point out on page 13, as part of the factual statement, that defendant did not object to the form of the monthly reports of values submitted. Nowhere in the brief is there any authority pointing out a duty on the part of the insurer to object. As enlarged upon, *infra,* the basic reason for the reporting form of policy is to take out of the hands of the insurer, the power to determine the amount of premium, and to place it entirely within the hands of the insured. The insured is given complete freedom by this form of policy to report in any form, and in any amount of value. For the insurer to object is to deprive this vehicle of its utility to the insured.

There is no conflict at all upon the fact that had Mr. Cordeiro asked for a limit of liability of $50,000.00 on the new location, that the insurance company would have rejected the proposal. As it was, because of the nature of the building and the exposures involved, the $25,000.00 limit was written as a matter of accommodation only, not because the insurance company actually wanted to underwrite the particular risk. (RT 209-214.)

Probably the best factual summary which could be written in this matter is contained in the Memorandum and Order of the Trial Court. (CT 80, 81.) The facts simply are that as to the new location, the insurer agreed to be at risk to the extent of $25,000.00, on the new location, so notified plaintiff insureds, who accepted the endorsement providing for the new insurance. There is neither foundation for mutual mistake, unilateral mistake, nor estoppel which would justify a reversal of the decision of the trial Court.

IV. ARGUMENT.

1. THERE IS ADEQUATE EVIDENCE TO SUPPORT THE FINDINGS OF THE TRIAL COURT.

This is an action to reform a written contract of insurance, to wit, the endorsement providing for coverage on stock and equipment of the insured at the new location, 1105 Sixth Street, Los Banos. The coverage had a $25,000.00 limit. Plaintiffs seek to reform this limit to make it read $50,000.00.

Plaintiffs proceed upon three theories of action. The first is that there was a mutual mistake in the making of the contract. The second that there was a unilateral mistake in its making, which mistake was known or suspected at the time of the making of the contract, by the defendant insurer. The third is upon a theory of estoppel.

The right to reform a written contract in California is governed entirely by statute, Section 3399 et seq. of the Civil Code.

> "§3399. When, through fraud or a mutual mistake, or a mistake of one party, which the other *at the time* knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention . . ."
>
> "§3400. For the purpose of revising a contract, it must be presumed that all of the parties thereto intended to make an equitable and conscientious agreement."
>
> "§3401. In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the in-

quiry what the language of the instrument was intended to be."

Nature of the Remedy Sought by Plaintiffs.

The power of the Court to reform a written contract has been part of the law of California without special reference to §3399 et seq. of the Civil Code.

Stafford v. California Canning Peach Growers (1938) 11 C. 2d 212, 78 P. 2d 1150.

To reform a written instrument, the conditions specified in the Code must be met.

"Reformation in case of mistake may be granted only where the case is brought within the provisions of Section 3399 of the Civil Code."

Security First Nat. Bank v. Loftus (1933) 129 Cal. App. 650, 19 P. 2d 297, at 299.

Thus, for plaintiffs to prevail in this case, they are obliged to prove either (1) that both parties, plaintiff and defendant, intended that the new insurance for the new location was to be in the provisional amount of $50,000.00; or (2) that plaintiffs were mistaken in the amount of insurance they thought they had, *and that at the time of the negotiations which culminated in the issue of the endorsement to cover the new location, that defendant knew or suspected plaintiff's error.* The other statutory ground for reformation, fraud, is not alleged in the complaint and is not an element in this case.

It is important to observe that none of the statutory grounds for reformation include estoppel. Save for the two Federal cases cited by Appellants, which are not applicable as is set forth in detail in Section 2, *infra,* there is no case authority in California

which will authorize a reformation of a written contract on grounds of estoppel. This being a diversity case, the rule of *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938) governs the applicable law.

To reform a written contract, a mere preponderance of the evidence is insufficient. The evidence must be clear and convincing. It must also be without material conflict.

> "The rule that relief by way of reformation will not be granted unless mutual mistake be proven by clear and convincing evidence, and not by a mere preponderance, Restatement of Contracts, §511 [and other authorities cited] is a salutary one, operating to prevent the substitution of parole for written contracts upon loose and unsupported claims that the agreement was other than it appears as written."
>
> *Day v. Firemans Fund Ins. Co.* (1933, C.A. 5) 67 F. 2d 257, at 258.

This is likewise the law of California.

> "In order to reform a written instrument the plaintiff must prove the mutual mistake by clear and convincing evidence."
>
> *California Pacific Title Co. v. Moore* (1964) 229 C.A. 2d 114, 40 Cal. Rptr. 61 at 63.

And it has been the California law since the days of Mr. Chief Justice Field.

> "The evidence, it is true, must be clear and convincing, making out the mistake to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt."
>
> *Lestrade v. Barth,* 19 Cal. 660 at 675, quoted with approval in
>
> *Girard v. Miller* (1963) 214 C.A. 2d 266, 29 Cal. Rptr. 359, at 363.

The only conflict in the evidence in this case, if there is a material conflict at all, is whether Mr. Hoffman on behalf of the defendant insurer, told Mr. Cordeiro that the limit of liability on the new location was to be $25,000.00. Mr. Hoffman says he did. (RT 158:10-20.) Mr. Cordeiro says he did not. (T 58: 14-18.) Mr. Cordeiro does say absolutely that Mr. Hoffman did not tell him that he would be covered to the extent of $50,000.00. (RT 76:20-23.) The trial court found as a fact that Mr. Hoffman did inform Mr. Cordeiro that the limit of liability on the new location was $25,00.00. (CT 81; CT 84, Finding No. VII.)

Where a conflict in the evidence of this nature obtains, particularly in a reformation case, the trial court finding should be affirmed.

> "In such situations [conflict of evidence] great reliance must be placed on the assessment of the conflicting evidence by the trier of fact, who is best situated to judge the credibility of the witnesses before him. We can only differ from his assessment if we determine that it was clearly erroneous and without support in the record."
>
> *Unitec Corp. v. Beatty Safway Scaffold Co.* (C.A. 9, 1966) 358 F. 2d 470, at 474.

Appellee submits that there is adequate evidence in the record to support the findings.

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2. THERE IS NO ESTOPPEL, EITHER IN LAW OR IN FACT.

This numbered section of Appellee's brief is intended to reply to Section 1, pages 16-19 of Appellants' Brief.

If the claimed estoppel is to be based upon a representation in the form of declarative conduct, Appellants' Brief is less than clear. On page 16 in two instances Appellants refer to estoppel on the insurer to deny that coverage existed for a particular *"peril* excluded from coverage." There is no issue of estoppel to deny coverage for particular perils in this case. The peril insured against was fire. A fire occurred. The question is whether there is evidence to estop the defendant from asserting the agreed upon limit of liability at the new location was $25,000.00.

If the rule in the case of *Ivey v. United National Indemnity Co.* (C.A. 9, 1958) 259 F. 2d 205, supersedes the statute which defines the limits on the right to reformation, Appellants herein have not made the same factual showing which justified the result in the *Ivey* case. In Dr. Ivey's situation, Dr. Ivey as insured, was concerned about specific potential liabilities involved with his duck hunting property. There were two vital evidentiary elements in that case which warranted the reversal of the trial court decision. The first was the determination that in the application for insurance,

> *"the broker notified the company* that appellant wanted both property damage and bodily injury liability coverage on the duck hunting property; and that he, the broker, understood from appellee that such coverage was provided by the policy, *and that he had so informed the appellant."* (*Ivey,* supra, at p. 206.) (Emphasis added.)

The second was a distinct and clear representation *by the agent of the company* that

> "the policy provided the property damage coverage desired and *so informed Dr. Ivey when the*

policy was delivered." (Ivey, supra, at p. 209.) (Emphasis added.)

No such overwhelming evidence appears in this case. To the contrary, the testimony is that the insured did not specify a $50,000.00 limit of liability; did not ask for a $50,000.00 limit of liability; and was informed that the limit was $25,000.00. (RT 158: 10-20.)

Nor does the factual predicate which justified the decision in *Beach v. United States Fidelity and Guaranty Company* (205 C.A. 2d 490, 23 Cal. Rptr. 73, 1962), relied upon by Appellants, exist in the case at bar. In that case, the agent had full knowledge imparted to him of the situation by the insured, and was affirmatively negligent in securing the required coverage. In fact, in the *Beach* case the insured was continuously concerned (compare Mr. Cordeiro's lack of concern herein) over the problem of coverage, and sought from the company an assurance that he was in fact covered. He was told by the company representative,

> ". . . to quit worrying about it, that it was all taken care of, and that he (Thomas) was covered."
>
> *Beach* case, *supra,* at p. 75 of 23 Cal. Rptr.

The rule in the *Beach* case cannot be stretched to include a case where Mr. Cordeiro, as insured, is relying upon what he *assumes* Mr. Hoffman learned from observation alone, when in the face of that observation Mr. Cordeiro affirmatively represented that the old appliance store was going to continue to operate "as is" (RT 54:4-16) and also told Mr. Hoffman he was carrying only a $16,000.00 inventory in the

new location, and where Mr. Cordeiro admits he was never told he would have $50,000.00 on the new location (RT 76:20-23).

Nor, in the matter now before the court, are there any facts which would support invocation of the rule of *Owen v. American Home Assurance Company* (USDC, ND, Cal., 1957, Judge Halbert) 153 F.S. 928, cited by Appellants. The rule there is that an estoppel may arise if the agent gives a "misleading, incorrect or incomplete answer, without qualification . . . to a *specific question* by a prospective insured concerning coverage . . ." (*Owen, supra,* at 930.) [Emphasis by counsel.] There is absolutely no evidence in the present matter to support such a finding.

The case of *Tomerlin v. Canadian Indemnity Co.,* 61 Cal. 2d 638 (1964) 39 Cal. Rptr. 731, has to do only with the conduct of the company's counsel and the insured's counsel after the loss, concerning the duty to defend. It is not a case wherein *coverage is created by estoppel.*

The recital of facts in the remainder of the cases cited in Section V. 1. of the Appellants' Brief are equally inapplicable to support the invocation of any rule of law whereby coverage in the amount of $50,000.00 could be created by estoppel.

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3. THERE IS INSUFFICIENT EVIDENCE UNDER THE LAW TO FIND AN ESTOPPEL IN ANY EVENT.

In the *Granco Steel* case cited by Appellants, the elements of an estoppel in an insurance case are set forth.

> " 'Generally speaking, four elements must be present in order to apply the doctrine of equitable

estoppel; (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'"

Granco Steel, Inc. v. Workmen's Compensation Appeals Board (1968) 68 Adv. Cal. 191, 436 P. 2d 287, 65 Cal. Rptr. 287 at 295.

Was defendant insurer apprised of the true facts, so as to find the first necessary element of an estoppel? The trial Court found no estoppel. The record adequately supports this finding.

At the risk of repetition, all that the insurance company representatives did know about the new location is what they observed, and what Mr. Cordeiro told Mr. Hoffman. The old store was the appliance store. Mr. Cordeiro stated to Mr. Miller he intended to retain that operation "as is." Mr. Hoffman asked for and received the dollar sum of the inventory of the new store as $16,000.00. (RT 74:20-25; 75:1.) Mr. Hoffman observed only what appeared to be "display models" of appliances in the new store. (RT 146:12-25, 147:1-5.) Mr. Cordeiro never discussed a specific dollar limit in amount of insurance. (RT 74:13-16.) Mr. Cordeiro never specified any upper limit of insurance he wanted. (RT 74:17-19.) Mr. Cordeiro told Mr. Hoffman he intended to retain the old store. (RT 75:10-12.) The presence of a few appliances in the new location, which presence was obviously for display as distinct from inventory, is not notice to the insurance

company of any material change in the risk as a furniture store. (RT 158:1-7.)

The record demonstrates that Appellee did not have knowledge of the facts sufficient to overturn the trial Court's finding that there was no estoppel.

In any event, the knowledge which insurer did have, has to be considered in the light of the law as to the duty of the insured, himself, to apprise himself of the terms and conditions of the insurance. Plaintiffs' right to reform the contract, whether predicated upon estoppel or mistake, is a right which is conditioned by their own diligence. The mere fact that plaintiffs, as insureds, were (allegedly) not aware of any limitations on the coverage does not, in and of itself, justify a reformation of the contract. See, e.g., *McCormick v. Orient Insurance Company,* 86 Cal. 260, 24 Pac. 1003 (1890). In that case, the Court held that the insured's ignorance of a condition of the policy requiring sole and unconditional ownership of the insured property did not justify reformation to delete that clause.

> "The law required of appellee but reasonable diligence under the circumstances [when it comes to the duty of the insured to read his policy and be aware of its terms . . .]."
>
> *Connecticut Fire Ins. Co. v. Oakley etc. Building and Loan* (C.A. 6, 1936) 80 F.2d 717, 720.

Where the plaintiff seeking reformation of the policy has employed *no diligence,* as in the case at bar, reformation is denied.

> "While the mere failure to read a policy does not in itself necessarily prohibit a revision of the contract, yet such failure on the part of the policy holder is a circumstance to be considered by the

> court on the question of his negligence. So, also are the experience and intelligence of plaintiff factors to prove his neglect. Unless the policy holder making such excuse gives a satisfactory explanation of his failure to read it, the trial court may be justified in rejecting his excuse and in denying reformation. The court is not bound to accept just any excuse offered by the holder of a policy seeking a reformation of its provisions for his failure to read it at the time he received it."
>
> *Taff v. Atlas Assurance Co.* (1943) 58 C.A.2d 596, 137 P.2d 483, at 487.

If the insurer is to be charged with an estoppel, it is *entitled to assume* that the plaintiffs would examine the policy. Appellee wishes to emphasize that the endorsement covering the second location bore the limit of liability upon the face of the document. (Plaintiffs' Exhibit 6.) It was not hidden away in some obscure portion of the contract, as the Court found the situation to be in *Gray v. Zurich Insurance Company* (1966) 65 Cal.2d 263, 54 Cal. Rptr. 104.

> "Certainly no facts are pleaded showing that defendant knew or could have known that the plaintiff would not examine the policy issued to it; nor that defendant or its agent took any affirmative action to prevent such examination. Plaintiff is therefore not entitled to a revision of the policy."
>
> *Bank of Fruitvale v. Fidelity and Casualty Co. of New York* (1918) 35 C.A. 666, 170 Pac. 852, at 854.

The *Taff* case, *supra,* which makes material in a reformation case the issue of whether circumstances were such that the insured must exercise some care to read the policy, remains the law, having been expressly approved in 1966.

> "'Reformation of a policy on ground of mutual mistake without the exercise of reasonable care on the part of the insured is not to be encouraged.'"
>
> *Laing v. Occidental Life Insurance Co.,* 244 C.A. 2d 811, 53 Cal. Rptr. 681, at 686, citing the *Taff* case.

Plaintiffs exercised no care at all.

For Appellants to suggest that somehow, the insurance company is charged with knowledge it never received, so as to lay the foundation for an estoppel, is to ask the Court to ignore the express statutory duty of the insured in the matter of making disclosures. *It is the duty of the insured to disclose. It is not the duty of the insurance company to inquire.*

> "Each party to a contract of insurance shall communicate to the other, in good faith, *all facts within his knowledge which are or which he believes to be material to the contract* and as to which he makes no warranty, and which the other has not the means of ascertaining."
>
> *Insurance Code,* Sec. 332. (Emphasis by counsel.)

The penalty on the insured for violation of Section 332 of the Insurance Code is the avoidance of the policy, see e.g., *Merchants Fire Assurance Corp. v. Lattimore* (C.A. 9, Cal., 1959), 263 F.2d 232. If an insured is bound to make a full disclosure, under penalty of forfeiture of the policy, it seems unreasonable for plaintiffs to assert they are entitled to a reformation of the contract made because they did not make a full disclosure.

Mr. Cordeiro testified he neither asked for $50,000.00 in insurance, nor did Mr. Hoffman tell him

that he was to get $50,000.00 in insurance. Both Mr. Hoffman and Mr. Cordeiro agree that Cordeiro said he had an inventory of about $17,000.00, and equipment and tenants improvements valued at approximately $3,000.00 to $4,000.00. On this basis, defendant insurer wrote a $25,000.00 limit, and so informed Mr. Cordeiro. It could not have been otherwise under the facts and the law.

> "Insurance is a contract upon a speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void because the risk run is really different from the risk understood and agreed to be run at the time of the agreement."
>
> Lord Mansfield in *Carter v. Boehm,* 97 English Reprint 1162, 13 Eng. Ruling Cases 501.

Reformation of the contract can scarcely be predicated upon knowledge of the insurer, when the insured never imparted the same to it, and when the law has placed upon the insured the duty to speak as to all material matters so that the company could be correctly informed.

The final and most convincing evidence that the Appellee did not have knowledge of the facts to satisfy the first requirement of an estoppel is contained in Defendant's Exhibits E, F and H. These are

the field notes of Mr. Hoffman, and the summaries thereof. They were prepared at the time of the conference with Mr. Cordeiro at the new location. They correctly relate the matters which are material to the insurance on the new location. As plaintiff's Exhibit 6 makes clear, and as Messrs. Hoffman and Girdlestone testified, appliances are a fire risk different in character than is new furniture. If Mr. Cordeiro had even remotely suggested to Mr. Hoffman that appliances were to be a main line in the new location (instead of telling Mr. Hoffman that he intended to retain the old location) (RT 75:10-12), the rate would have been different, and the risk would have been different. However, Mr. Hoffman, whose business it was to find out the factors material to the risk, noted on his field notes, "retail furniture store." (Defendant's Exhibit H.) If he had been informed that appliances were involved other than the display models he observed, the inference is irresistible that he would have so noted. His duty to his employer would have required him to do so. Had a full disclosure been made by Mr. Cordeiro, he would have performed that duty.

The record is also totally devoid of evidence to support the second requirement of an estoppel,

> "(2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended." (*Granco Steel* case, *supra.*)

There is no direct testimony by any person that, even assuming defendant insurer had knowledge never given it, the insurer in any way did anything at all to mislead the insureds. The endorsement with the

$25,000.00 limit was delivered to Appellants. This itself constitutes notice of what the limit of liability was.

Appellants seek to fill this evidentiary vacuum with a self-serving, bootstrap argument that acts done after the meeting between Mr. Cordeiro and Mr. Hoffman, somehow change the picture. Observe the Appellants on page 22 of the opening brief,

> "We are not here to reargue the evidence on the question of whether or not Hoffman told Cordeiro 'that the limit of liability on the fire insurance on the new location was $25,000.00' (CT 84:16-20)."

Indeed! The trial court's finding on that issue is the end of the case. Mr. Hoffman said he did tell Cordeiro. Cordeiro denied it. The trial court resolved the conflict by believing Mr. Hoffman.

Appellants cannot pass off this adverse finding by declaring that there should have been a finding that Mr. Cordeiro understood that there was a limit of liability of $25,000.00. What else could the insurance company have done? First, it relied upon Mr. Cordeiro's representations to Mr. Hoffman. Secondly, it issued the endorsement with the $25,000.00 limit. *Is not an insurance company entitled to assume, in an arm's-length transaction, that the insured understands simple English communication?*

Is there any law which places upon the insurance company the duty not only to tell the insured the facts, but then cross-examine the insured to make sure that the insured did in fact understand what he was told?

Appellants' suggestion that there is such a duty is fatuous. If this were not such a serious matter, the suggestion could be characterized as whimsical. We ask the Court to consider for a moment, the incredible state in which industry and commerce would find itself if in every situation where contracts were negotiated between rational adults, after agreement was believed to be had, that one side would have to schoolteacher lecture the other as to the agreement actually made under pain of being estopped in later litigation to deny that the contract means something different from what was agreed upon and reduced to writing.

The only situation under the law where a contracting party is bound to any such standard of conduct is where there is a confidential relationship. Appellants are not entitled to impose the confidential relationship standard on the making of the contract which they now seek to reform.

The same argument applies to Appellants' plaintive statement of page 28 of the opening brief:

> "We would not be in Court today if Hoffman had said to Cordeiro: 'I have authority to insure your inventory in the new store for only $25,000; that may be insufficient for your operation; you had best get additional insurance somewhere else.'"

The answer to that is simply, we would not be in Court today if Mr. Cordeiro had made a full disclosure to Mr. Hoffman as is required by Section 332 of the *Insurance Code.*

Implicit in Appellants' complaint in this appeal is that there ought to be a duty on the part of every insurance company to tell the insured how much in-

surance he ought to have, and the insurer's failure to do this will charge the insurer with liability for such excess of loss over the insurance actually written.

Only the insured knows how much insurance he needs. Only Mr. Cordeiro knew of his intention at the time of the negotiation with Mr. Hoffman (if he even had an intent at that time) to subsequently move a massive inventory of appliances into the new location. How could any insurance company divine what future commercial expediency would induce an insured to increase his inventory?

What Appellants seek to do here is to repeal that chapter of the Insurance Code dealing with the duties of insurer and insured at the time of execution of the contract. *(Insurance Code,* §330, §339.) It wishes to place upon the insurance company the burden of "big brothering" the insured. It wishes to make the insurer inject itself into the insured's business, to nag the insured into doing something to protect himself (and thus earn an additional premium for the insurer) under penalty of being held to a higher liability than that for which it contracted. The ultimate result of Appellants' theory is to require the insurer to substitute its judgment for that of the insured, as to those matters which, until now, have always been committed to the discretion and judgment of the insured.

If there is a duty on the part of the insurer to tell the insured how much insurance he ought to have, then there ought to be a reciprocal duty on the part of the insured to take it. It is interesting to speculate upon what such a rule as Appellants seek for here would do for the welfare of insurance salesmen.

Appellants go forward with more argument based upon a speculation as to "what might have been and so therefore, it should be". This is the tenor of the argument that *if* the insurance company had supplied Mr. Cordeiro with a supply of forms for reporting his values in the form of Plaintiffs' Exhibit 9 for identification, then these would have constituted notice to the insured. Mr. Cordeiro had no knowledge of what the forms he used did say, let alone what the ones he did not use might have said.

"Q. You have no recollection of having signed any reporting forms on your old policy?

A. No, sir.

Q. Did you authorize anybody else to sign them for you?

A. If there was any, usually the bookkeeper done it.

* * * *

Q. With reference to Exhibit 5, the form of report that Mr. Cathcart showed you, sir, do you know where these came from? Do you know where this came from, sir?

A. I presume it came from American Home, sir.

Q. Well, do you recall Mr. Miller handing you a number of those forms?

A. Myself, no, sir.

Q. Do you know if you received a number of these forms in the mail from Mr. Miller or anybody else?

A. Personally, no.

Q. Then as far as you are concerned, the source of that form, except for what it says on the face of it, you have no recollection at all?

A. The only recollection I have is that when I signed I knew they were from American Home.

Q. But you don't know where you got the forms?

A. All I know is what Mr. Miller said, is that these things came from American Home and that we'd have to send them in.

Q. All you know about them is what Mr. Miller told you?

A. Right, sir.

Q. You don't remember having gotten a sheaf of forms in a pad or getting them in the mail or anything like that?

A. No, sir.

Q. Did you ever give any instructions to Mrs. Sylvester, who worked in your office, with respect to the filling out of that form?

A. Yes.

Q. What instructions did you give her, sir?

A. That she should—at that time we was working with Mr. Machado at the time and to send in the inventory and the stock report every month."

(RT 66:1-6 and 67:6-68:14.)

The information contained on the forms is not notice to the insurance company as to any misapprehension on the part of the insured as to his coverage. *This is because the contract of insurance expressly contemplates that reports of values may be in excess of the limit of liability.*

In this respect the contract (Plaintiffs' Exhibit 6) states in part:

> "Any loss in excess of the limits of liability stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium be adjusted on the basis of the full values reported."

The reason for the reporting form policy of insurance is to place within the sole control of the insured,

the amount of the premium which the insured is willing to bear. The function of the reporting form is to deprive the insurance company of the power to determine the amount of premium. The cases are uniform in their holding that the reports of values to the insurance company are not notice of anything except as to the amount of premium the insured is willing to be liable for. The insured is privileged to report no values, low values, or high values.

> "If the insured reported its actual values at the end of each month, it would have complete coverage. But, if it reported less than its actual values, it would have proportionately less coverage and a proportionately smaller premium. *By its reports the insured could not extend the insurer's liability beyond the agreed limit of liability,* but it could reduce both its premium and its coverage by reporting a less amount of value than it actually had."
>
> *Peters v. Great American Insurance Co.* (C.A. 4, 1949) 177 F. 2d 773 at 776. (Emphasis by counsel.)

The *Peters* case, *supra,* also holds that the reports of values do not lay the foundation for an estoppel. Further, the case is authority for the proposition that the doctrine of estoppel cannot be employed, at least in the context of the reporting form policy, to create insurance where none was agreed upon at the outset.

The case of *Camilla Feed Mills, Inc. v. St. Paul Fire & Marine* (C.A. 5, 1949) 177 F. 2d 746, bears a factual relationship to the case at bar. In it, the insured sought to reform, after the loss, an erroneous report of value, on the ground of mistake. The Court ruled the insured was not permitted to do so, the mis-

take being that of the insured in rendering the report. There is no duty on the insurer to dispute the correctness of any report, or investigate the same.

> "It would be practically impossible for the insurance companies to check the books of all such insureds at the end of each month. . . . The companies have to depend on the reports of their insureds. The premiums are calculated on the reported values made by the insureds and not on any checked values made by the insurers."
>
> * * * *
>
> "The liability of the insurer was fixed at the time of loss and the appellant cannot, now, after the fire, increase this liability by offering to pay any additional premiums."
>
> *Camilla Feed Mills, Inc. v. St. Paul etc., Insurance Co., supra,* at 751 of 177 F. 2d.

This case specifically holds that an erroneous report of values to the insurance company is not notice except a figure upon which a premium is to be calculated. It necessarily follows that where defendant issued an insurance policy in this case, which policy specifically provided that reports of values may well be in excess of the provisional amount of insurance, a report in excess of $25,000.00 is not a representation to defendant, or notice to it, that plaintiff made a mistake *at the time* the insurance was originally bargained for. Therefore, the reports cannot operate as the predicate for any kind of estoppel on the company of the right to assert it contracted only for $25,000.00 insurance.

Even if the plaintiffs here were supplied with the form of report which is Plaintiff's Exhibit 9 for Iden-

tification, its use would not have placed upon the insurer any duty to watchdog the insured.

"Mere silence will not create an estoppel."

18 *Cal. Juris.* 2d 408.

In point on this issue is *American Building Maintenance Co. v. Indemnity Company of North America* (1932) 214 Cal. 608, 7 P. 2d 305. The insurance company contended that the retention by the insured of an endorsement limiting the coverage, without comment or objection, worked an estoppel on the part of the insured to deny acceptance. The Court held there could be no estoppel based upon silence.

> "Appellant [insurer] strongly relies upon the retention of the rider in the office of the plaintiff corporation as creating an estoppel against the plaintiff to deny the validity of the modification of the contract and the consequent elimination of the liability for elevator operations. . . . *We do not think the doctrine of estoppel is applicable. It is to be noted that the claimed estoppel is based not upon an affirmative act on the part of the plaintiff corporation, but upon silence or acquiescence. . . .*"
>
> * * * *
>
> "In estoppel, *there must be something willful and culpable* in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict."
>
> *American Building Maintenance Co. v. Indemnity Co. of N.A., supra,* at page 309 of 7 P. 2d.

Where estoppel is predicated upon silence there must be shown a duty to speak.

> *California Packing Co. v. Sun Maid* (C.A. 9, Cal. 1936) 81 F. 2d 674 at 679.

There can be no duty to speak on the part of the insurance company. There was nothing in the conduct of the insured, or the terms of the contract, which gives rise to a duty on the part of the company to tell the insured anything. The entire purpose of the reporting form policy is to place upon the insured the duty to communicate, not to place on the insurer a duty to shepherd the insured and lead him around by the hand. If this were true, the reporting form policy would serve no function.

The case of *Security Insurance Co. v. Old Poindexter Distillery, Inc.* (Ky., 1951, 7 C.C.H. Fire & Casualty Reports 588)[1] is illustrative of the reporting form policy, and the obligations under it. The insured therein reported values in excess of the limit of liability, just as plaintiffs did at the case at bar. The report of values over the limit of liability resulted in additional premium being due the insurer. The policy contained the following provision, similar to the American Home policy.

> ". . . Any loss in excess of the limits stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full value reported."

The insured contended that it should not be charged a premium when the values reported were in excess of the limit of liability. The Court ruled for the insurance company.

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[1]Counsel has not been able to locate an official citation. To aid the court, a copy of the published opinion was annexed to the Trial Brief, and is reproduced on pages 67 through 71 of the Court Transcript.

> "The [Purpose] of . . . the policy . . . is to measure the protection afforded under the policy by the amount of exposure which the insured is willing to report and pay for. Security had no way of knowing in advance how much Poindexter wanted to insure, but had to rely on Poindexter's reports of values for that information. Under the policy Security protected Poindexter for the full value of its property at the insured locations, up to the limits of liability stated in the policy, provided that Poindexter paid the premium for such protection. The premium is based on the reports made by Poindexter. If Poindexter chose to report less than the values actually on hand at any location it would pay a smaller premium than if it reported full values and would recover only that proportion of its loss at such location which the values reported bear to the actual values at the location as of the date for which the report was made. Both the insurance protection purchased by Poindexter and the premiums which Security was to receive were determined by the amount of the values reported by Poindexter, *and these reports were in the sole control of Poindexter.*"
>
> *Security Insurance Co. v. Old Poindexter Distillery, Inc., supra.*

The insurance policy sought to be reformed in this action contemplated reports in excess of the provisional amount of insurance. The amount of the values reported, or the irregularity of the reports, cannot be the foundation for a waiver or an estoppel, for the effect of the report is only to control premium, and amount of insurance within the provisional limit. It does not control anything else and is not notice of anything else.

A necessary element of estopel is a *justifiable reliance* on the conduct of another. Where the policy gives to the insured the permission to control the amount of premium by his reports of values, there can be no justifiable reliance on any conduct the insurance company manifests. Rather, the reverse is true. The company is entitled to assume the insured knows what he is doing, and intends the reports to be exactly as they were, and to receive premium accordingly. It is more reasonable to declare that by reason of the terms of the policy concerning reports, plaintiffs should be estopped to assert any mistake, rather than vice versa.

So far as the issue of an alleged duty to put the insured on notice of his purported misapprehension, by supplying him with the form which is Plaintiffs' Exhibit 9 for identification, the policy itself is a notice to the insured to render separate reports of values. As testified to by Mr. Girdlestone, the insurer is totally indifferent to the kind of form which the insured may elect to use. He can do it on his letterhead, if he wishes. (RT 96:15-18.)

Finally, Appellants complain that they do not understand the wording of the policy which states: "Any loss in excess of the limits of liability stated in this policy shall be borne by the Insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported."

Appellants then torture an interpretation of that clear language into a reading that the report of values in excess of the limit of liability, constitutes "such other insurance".

In the first place, since it is admitted that neither of the appellants read the policy, they would appear to have little equity to contend now that the language of it means something different than they thought it to mean.

Secondly, this is the first time in this cause that the issue of interpretation of the policy has been raised. Raising the point the first time on appeal is too late. The Complaint (CT 1-2) and the Pretrial Conference Order (CT 5) both provide that the issue that was tried in this cause to be the right of plaintiffs to reform, under the doctrine of mistake, or of estoppel, the contract by raising the limit from $25,000.00 to $50,000.00. As neither Appellant read the contract, no foundation for estopel exists, nor can it be based upon an interpretation of the unread document.

Thirdly, if Appellants had read the contract, they would have observed references therein concerning "other insurance" which it was the option of the insured to secure if they saw fit to do so.

Finally, to terminate this response to Section 2 of Appellants' Brief, Defendant and Appellee submits that little is to be gained in the administration of justice by arguing that there is, or may be, some new standard of public morality which is binding only on the insurance company, and which is found enunciated in an article in the California Law Review.

This policy, which plaintiffs did not read, met the standard of *Gray v. Zurich Insurance Company* (1966) 65 Cal. 2d 263. Whatever the social requirements may be with reference to insurance, Appellee clings to the belief that there is still remaining and

enforceable, a traditional standard of private morality which holds that where Mr. Cordeiro tells Mr. Hoffman that he has a $16,000.00 to $17,000.00 inventory at the new location; that where Mr. Cordeiro tells Mr. Hoffman he intends to retain the old location which is the appliance store; that where Mr. Cordeiro does not tell Mr. Hoffman of any intent to move the appliance store to the new location; that where Mr. Cordeiro does not ask for $50,000.00 coverage; and where Mr. Hoffman tells Mr. Cordeiro that he is getting $25,000.00 coverage, and the insurance is issued accordingly, there are no equities based on a supposed social need which would justify reformation of the contract.

Ordinary social requirements require that written contracts be upheld as written—not altered after the event upon the undocumented assertion by one party that it meant something different to him. Particularly where that person exercised no care of his own to read the contract.

Insurance companies are as much entitled to equal protection of the laws as are insureds. Insurance is a contract upon a speculation, based upon a contingent future event, with a *fixed maximum exposure* by means of policy limits, if the contingency occurs. Is there not a social need to hold that insurers who act in good faith are entitled to rely upon the terms of their contracts which are fairly made?

4. "OBJECTIVE" vs. "SUBJECTIVE" INTENT.

In Section 4 of the Appellants' Brief, it is argued that the "objective intent" of Appellants in the making of the contract, should govern their right to reform it. Two cases are cited, both of which are readily distinguishable from the instant case.

Appellants' reliance on *Maier Brewing Co. v. Pacific National Fire Ins. Co.* (1963) 218 C.A. 2d 869, 33 Cal. Rptr. 67 is misplaced. Because of the emphasis by Appellants, a brief discussion is in order. Insured Maier Brewing Company had insurance exposures at a number of locations, and had a number of policies. The property in question, known as "Gas Company" property, was omitted from the property schedule on the Pacific National policy. There was conflicting evidence tending to show Maier had brought its ownership of the Gas Company property to the attention of the agent. In the transaction which gave rise to the Pacific National contract, "envelopes contained the endorsements with the description of the Gas Company property thereon", were delivered to the agent. The trial Court found as a fact on this evidence that Maier had intended to have the Gas Company property insured on the schedule of properties covered by the Pacific National Contract. The Court ruled that within the factual matrix presented Maier Brewing had a right to assume it was insured— ". . . what would a reasonable man believe from the outward manifestations of consent." *(Maier Brewing Case,* at 69 of 33 Cal. Rptr.)

That case does nothing for appellants here. The "objective" situation at the time of the negotiations

between Mr. Cordeiro and Mr. Hoffman was that Mr. Cordeiro was keeping the old store in *status quo* ("as is", he told Mr. Miller) and so advised Mr. Hoffman. "Objectively", all Mr. Cordeiro wanted, asked for, and got, was insurance on the furniture store.

The evidence that Mr. Hoffman and Mr. Girdlestone would not have considered fifty thousand dollars as the limit of liability on the new location was introduced to prove that there was no *mutual mistake* as to the amount of insurance. But, in *Maier Brewing Company v. Pacific National, supra,* the evidence was that both Maier as insured, and Pacific National's agent, on behalf of the company, both intended to insure all the property Maier had, which was listed on the endorsements delivered to the agent. The mistake was thus found to be mutual, on the "objective standard". The record of the cause at bar will not support such a finding.

The other case upon which Appellants misplace reliance is *Modica v. Hartford Accident and Indemnity Co.* (1965) 236 C.A. 2d 588, 46 Cal. Rptr. 158. This is the "Poor Shoemaker's Case". Mr. Modica, the "Poor Shoemaker" insured stopped school in the fourth grade. His business experience was limited to working in his father's shoe repair shop. His insurance experience was limited to holding a policy of G. I. Insurance as the result of his Navy Service. Defendant's agent undertook to advise the poor shoemaker as to the insurance required. Another broker, attempting to snitch the line, did a critique on the insurance defendant's agent had secured. As a result of this, the poor shoemaker asked defendant's agent

for additional coverage. On more than one occasion, defendant's agent affirmatively represented to the poor shoemaker that he had all the insurance he needed; that he was covered for everything. In fact, there was a prior loss by fire and defendant's agent again told him not to worry; that he was covered for everything. Defendant's agent actually took over the management of the poor shoemaker's insurance affairs. Then the loss in question occurred, and the poor shoemaker discovered he was not covered.

On that state of facts, the Court correctly permitted reformation.

The Appellants herein cannot bring their situation within the facts of the poor shoemaker's case.

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5. PUBLIC POLICY.

Appellants assert that the form of the contract of insurance is against public policy. They contend that where the premiums are measured by the reports of values, and not by the limit of liability contracted for, that the contract is somehow violative of public policy.

The public policy argument is always suspect.

> "It [public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. *It is never argued at all but when other points fail.*"
>
> Burrough, J., in *Richardson v. Mellish* (1824) 2. Bing. 229, 252, New York. (Emphasis by counsel.)

Appellants cite no authority that it is against the interests of the commonweal for insurers and insureds to contract to fix the premium in accordance with the amount of property which is subject to the peril insured against. Neither case cited supports Appellants' view. In particular, *Ohran v. National Automobile Ins. Co.* (1947) 82 C.A. 2d 636, 187 P. 2d 66 is destructive of Appellants' position. In that case the Court ruled that the company was entitled to its premium when it was at risk by operation of law, in spite of the insured's declared intent to cancel the policy, and not pay a premium.

The second objection to the public policy argument is that it, like the policy interpretation argument is being raised now for the first time on appeal.

The third objection is one based upon simple logic and reason. American Home Assurance Company agreed to be at risk on a stock of goods at the new location, with a limit of liability of $25,000.00, premiums to be determined upon the total reported values at the location. One does not have to be versed in insurance to know that most losses by fire are partial losses. Seldom is the fire loss to property total. Fire insurance premiums are based on a statistical probability of loss, both as to the projected number of fires, and the probability of a total loss in such fires. It requires little wisdom to conclude that if the limit of liability on the fire insurance is $25,000.00, and a greater amount of goods are kept at the insured location (in this case $42,185.35, CT 35), the odds against there being a $25,000.00 loss at the insured location

are substantially greater than if the maximum amount of goods subject to the fire is only $25,000.00.

In other words, since most fire losses are less than total, if there is $25,000.00 or less in values subject to loss by fire, the chances are that the loss will be less than $25,000.00. And a premium is fixed accordingly. But if there are $42,000.00 worth of goods subject to loss by fire, the odds on there being a $25,000.00 loss are substantially greater. Therefore, *the premium is based upon the total values exposed to loss, not the total values insured.* Which is exactly the formula employed here to fix the premium.

Appellants' public policy argument fails in its entirety.

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6. THERE IS ADEQUATE BASIS IN THE RECORD TO SUPPORT THE FINDINGS.

Appellee respectfully submits that Appellants are nit-picking when they contend the findings are not supported. The trial judge found Mr. Hoffman told plaintiffs there was a $25,000.00 limit on the new location. Appellants ask, is that the only duty of Mr. Hoffman? The answer to that is, what other duty is there? There is no allegation of fraud herein. There is no law cited by Appellants that the insurer has any other duty than to act in good faith and make a full disclosure, which it did. Which is substantially more than can be said for the conduct of plaintiffs..

A complaint is made that there is no finding that plaintiffs "heard Hoffman tell them" that the limit was $25,000.00. There is another complaint that there

is no finding that Mr. Hoffman did not advise of the consequences of future and different acts by plaintiffs. And so on.

We are concerned herein with a contract of insurance, and its making. The Court found that it was made, and that there was neither unilateral, or mutual mistake. It also found no estoppel based upon the recited conduct. Nothing else need be shown. A finding that "A told a fact to B", necessarily imports B heard it and understood it. If this were not true, no judge or lawyer could draft supportable findings of fact. A finding that "a man bit a dog", does not require an additional finding that the "dog felt the man bite him".

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7. APPELLANTS' SPECIFICATION OF ERRORS ARE THEMSELVES INCORRECT.

Whether Mr. Cordeiro, in testifying as he did, was motivated in part by the natural human reaction that "The wish is the father of the thought," was a matter for the trial court to decide. It was decided against Mr. Cordeiro. But illustrative of the fact that one can misplace words, and thereby convey a different meaning than one might have intended, just as Mr. Cordeiro may have intended to make a full disclosure but did not, is Appellants' No. 3 of the Specification of Errors (Appellants' Brief, page 3).

The brief reads in part:

> "3. The finding (CT 84:16-20) that defendant's agent *Hoffman 'handled* all the negotiations on

behalf of both plaintiffs' and told plaintiffs that . . ."

In fact, CT 84:16-20 reads:

". . . Plaintiff Edwin *Cordeiro* who handled all the negotiations on behalf of both plaintiffs . . ."

This, of course, is a simple error in transposition of the names of the actors. But it demonstrates human frailties from which we all suffer.

So also, in Specification No. 4 (Appellants' Brief, page 4), a finding of fact wherein there was an obvious typographical error in its transcription, is seized upon as "confusing and contradictory" by Appellants. CT, p. 84, line 20, requires only the substitution of the word "at" for "of" for the correct meaning. Appellee is confident that no one was misled by this typographical error, any more than any one was, or will be, misled by the transposition of names in Appellants' Specification No. 3.

Thus, in the record of this cause, it is demonstrated that people make mistakes in the employment of words. They make them in spite of training and practice in careful draftsmanship. And of all of the documents which working lawyers prepare, none generates as much blood, sweat and tears as the preparation of findings of fact and conclusions of law, or briefs on appeal.

So, if working lawyers can make mistakes why cannot Mr. Cordeiro? The trial court found that the mistake, if any, was by Mr. Cordeiro alone. It found that it was not an error shared by Mr. Hoffman or

the defendant. The trial court also found nothing in the facts which justified invocation of the doctrine of estoppel.

V. CONCLUSION.

The reporting form of fire insurance policy, with its limit of liability, but which commits to the insured the power to determine how much insurance he wants, or is willing to pay for, within that limit, is a valuable instrument of commerce. The reformation of this, or any other contract, should not be permitted without a showing of the kind of mistake which has been traditionally required in such cases.

The trial judge found neither the required evidence of mistake, nor did it find conduct upon which an estoppel could be predicated. The estoppel cases relied on by Appellants, *Ivey v. United National, etc., Modica v. Hartford, etc., Gray v. Zurich (supra),* were all urged upon the trial judge. There is nothing new in the appeal which warrants a change in the trial court determination. Defendant Appellee respectfully submits the trial court should be affirmed.

Dated, San Francisco, California,
August 19, 1968.

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